



STATE OF NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION

ROY COOPER
GOVERNOR

J. ERIC BOYETTE
SECRETARY

April 15, 2020

Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Rd.
Raleigh, NC 27609

VIA ELECTRONIC MAIL ONLY TO: rrc.comments@oah.nc.gov

RE: CASH MANAGEMENT RULES

To Whom It May Concern:

The North Carolina Department of Transportation ("NCDOT") opposes the Cash Management Rules (20 NCAC 01I .0101 through 20 NCAC 01I .0105) proposed by the Department of State Treasurer ("DST"). DST lacks the authority to adopt the proposed rules, lacks the authority to adopt temporary rules, and improperly seeks to create authorities not granted by the General Assembly via the adoption rules. For these reasons, NCDOT requests that the Rules Review Commission ("RRC") object to the proposed Cash Management Rules.

First, DST lacks the authority to adopt the proposed Cash Management Rules. G.S. 150B-19(1) of the Administrative Procedure Act ("APA") authorizes an agency to adopt rules implementing or interpreting a law only when "that law or another law specifically authorizes the agency to do so." The APA principles outlined in G.S. 150B-19.1 further require that an agency "adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest." Neither North Carolina General Statute 147-86.15, which is cited by DST as the authority for these rules, nor any other provision of law authorizes DST to adopt the proposed Cash Management Rules. If any entity possesses the statutory authority to adopt such rules, it would be the State Controller or the State Treasurer.

Second, adopting the proposed Cash Management Rules as temporary rules is improper and outside the authority of DST. G.S. 150B-21.1 authorizes the adoption of temporary rules in limited circumstances, including when the full rulemaking process would be contrary to the public interest and immediate adoption of the rule is required by "the effective date of a recent act of the General Assembly...." DST cites S.L. 2019-251's passed and impending deadlines for the transfer of funds from the Highway Trust Fund to the Highway Fund as justification for adopting temporary rules. In doing so, DST ignores the language of S.L. 2019-251, which directs NCDOT – not DST – to transfer funds and requires NCDOT and DST to jointly approve a repayment schedule. The one-time legislative directive contained in S.L. 2019-251 neither amends nor alters whatever authority may exist pursuant to G.S. § 147-86.15 and does not justify the adoption of

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temporary rules interpreting and implementing a law that has been in effect for nearly two decades.

Furthermore, DST's contention that temporary rules are necessary and in the public interest due to the impact that this transfer might have on the ability of DST to issue Build NC bonds and maintain the State of North Carolina's AAA bond rating is disingenuous. The Secretary of Transportation and other senior staff from NCDOT met with the Treasurer and his senior staff on February 27, 2020 at DST's offices to discuss the transfer and repayment schedule required in S.L. 2019-251. At that meeting, NCDOT indicated, as it had in previous public statements, that the transfer of funds from the Highway Trust Fund to the Highway Fund required by S.L. 2019-251 was unnecessary and would have no beneficial impact on NCDOT's cash management. NCDOT and DST discussed a proposal for a one-day transfer of funds from the Highway Trust Fund to the Highway Fund with immediate reversion as a means to meet the legislative mandate without altering the balances of either fund. This short-term transfer would have zero impact on NCDOT's ability to finance bonds pursuant to the Build NC Bond Act, which itself prescribes the conditions in which the bonds may be issued, and poses zero threat to North Carolina's AAA bond rating. During the issuance of Build NC bonds in 2019, NCDOT and DST worked together to develop a process for the transfer of funds between the Highway Trust Fund and the Highway Fund that would both satisfy NCDOT's need for the occasional transfer of funds and DST's desire to maintain certain balances in each fund. Simply put, no necessity for the Cash Management Rules exists and thus adopting such rules, as temporary or permanent, is improper and contrary to the APA.

Finally, and perhaps of most concern to NCDOT, the adoption of the proposed Cash Management Rules would expand DST's authority over DOT financial management beyond any authority granted by the General Assembly. G.S. § 147-86.15 provides internal authority for DST to combine the Highway Fund and Highway Trust Fund for cash management purposes; it does not grant DST the authority to regulate NCDOT's management of its funds. Through the adoption of the Cash Management Rules, DST seeks to develop an application and approval process for the transfer of funds between the HTF and HF and to create an auditing function over all of NCDOT's finances. G.S. § 147-86.15, which is the only authority cited for these rules, provides DST with nothing more than a cash management accounting authority. G.S. § 147-86.15 contains no authority for the approval process and auditing authority contemplated by the proposed rules. S.L. 2019-251, which contains numerous provisions regarding financial management and accountability by NCDOT, does not grant DST the extensive authority to oversee NCDOT's finances it seeks to create via temporary rule. The Build N.C. Bonds Act does not grant DST the authority it seeks to create via temporary rule. Nowhere in General Statutes authorizes DST to exercise the power it seeks to create via temporary rule. Such an expansion of authority through rulemaking is contrary to the APA; for the Rules Review Commission to approve the adoption of an agency rule, G.S. § 150B-21.9 requires that the rule be "within the authority delegated to the agency by the General Assembly."

Thank you for your attention to NCDOT's concerns. For the reasons stated above, it is NCDOT's position that the RRC should object to all of the proposed Cash Management Rules.

Sincerely,



Daniel Johnson
General Counsel
NCDOT